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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	79142478
Applicant	iRezQ AB
Applied for Mark	IREZQ
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re iRezQ AB,

Applicant

Application Serial No. 79142478

APPLICANT'S EX PARTE
APPEAL BRIEF

I. INTRODUCTION

Applicant iRezQ AB ("applicant") hereby appeals the decision of the Trademark Office refusing registration of its trademark, IREZQ.

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II. APPLICANT'S MARK

Applicant has applied to register the mark IREZQ for “Computer software and application software for controlling the operation of audio devices, mobile phones, and the transmission of data, for use in the fields of safety, and prevention of personal injuries, and protection of property; computer software and application software to detect vehicle and personal locations; computer software and application software for provision of traffic information; downloadable databases in the fields of safety, and prevention of personal injuries, and protection of property; temperature sensors; optical sensors; movement sensors; acceleration sensors; humidity sensors; alarm sensors” in International Class 9.

III. THE EXAMINING ATTORNEY'S REFUSAL

The Examining Attorney refuses registration under Section 2(d) of the Trademark Act on the basis of a likelihood of confusion with the mark IREZ and Design in U.S. Registration No. 3526573 as shown below for “Video cameras; Webcams; Computer programs for driving, operating and interfacing video cameras with computers; Computer peripherals.”



IV. Marks Themselves Are Not Sufficiently Similar to Find a Likelihood of Confusion

Applicant's mark is the five-letter word, IREZQ. The registered mark is the four-letter word IREZ. The registered mark has two syllables ("i-rez") while applicant's mark has three ("i-rez-q"). Overall, the marks do not look alike or sound alike due to the presence of the letter Q in the applicant's mark.

During prosecution, applicant presented quantitative evidence of the relative rareness of marks having word(s) ending with the letter Q. Specifically, applicant submitted the results of a TESS search for live applications/registrations for marks containing words ending in Q which have goods in class 9. The search returned 1395 live marks (see Exhibit A to 8/25/14 Response to Office Action). To compare the relative frequency of marks in class 9 having word(s) that end in Q with marks in class 9 that end in other letters, we conducted searches for a sampling of marks ending in other letters. For this sample, we chose the first five letters of the alphabet, A, B, C, D and E, and the letter Z because it also appeared to be a less-commonly used last letter. These searches returned the following:

Last Letter of Word(s) in Mark	Number of Marks Returned	Comparison with Number of Marks Returned With Word(s) Ending in Q	Exhibit Number in Response to Office Action
A	21053	15.09 There are 1509% more marks that end in A than there are marks that end in Q.	Exhibit B
B	3825	2.74 There are 274% more marks that end in B than there are marks that end in Q.	Exhibit C

C	15982	11.46 There are 1146% more marks that end in C than there are marks that end in Q.	Exhibit D
D	29668	21.27 There are 2127% more marks that end in D than there are marks that end in Q.	Exhibit E
E	80909	58.00 There are 5800% more marks that end in E than there are marks that end in Q.	Exhibit F
Z	2622	1.88 There are 188% more marks that end in Z than there are marks that end in Q.	Exhibit G

These numbers¹ reflect the relative infrequency of marks covering goods in class 9 that include a word that ends in the letter Q on the Trademark Register. Accordingly, the uniqueness of the ending of applicant's mark would cause consumers to pay particular attention to the mark, and would serve as a basis by which consumers would distinguish applicant's mark from registrant's mark.

¹ The Examining Attorney has indicated that the quantitative data cited above has not been made of record, and presumably not considered by the Examining Attorney in reaching her decision, because applicant has not filed copies of the registrations or the complete electronic equivalent from the USPTO's automated systems. The data relied on by applicant for this argument is all from the USPTO online database. Because it is not practical to print out TESS or TSDR records for each of the over 150,000 marks referenced, applicant instead attached to its 8/25/14 Office Action response the TESS reports showing the search strings used and the "Record List Display" pages for each of the searches.

Because applicant is relying on the USPTO's own database and because applicant's argument is based on the sheer number of active applications and registrations located by the particular queries, it does not seem reasonable for the Examining Attorney to require that each USPTO electronic record be submitted to the USPTO by applicant before the evidence is considered. Because this data is pulled directly from the USPTO database, applicant submits that it is sufficiently proven as valid for the purposes of the Board considering the argument to which the data pertains.

During prosecution, the Examining Attorney stated that the letter Q in applicant's mark results only in a "slight difference in sound" between the marks, and this difference "is not sufficient to prevent confusion between the marks." 9/17/14 Office Action. The Examining Attorney also argued that "the applied-for mark is entirely comprised of the wording 'IREZQ' and the cited registered mark contains the wording 'IREZ.' Thus, marks are confusingly similar in appearance because they contain nearly identical wording, except for one letter that appears at the end of the applied-for mark." 4/18/15 Reconsideration Letter. The Examining Attorney diminishes the importance of the letter Q in applicant's mark without explaining why it is assumed that consumers would disregard the letter. In applicant's view, the addition of the letter Q changes the appearance of the marks and their pronunciations to such a degree that this difference alone enables consumers to tell one mark from the other. There is not adequate reasoning or evidence to support the Examining Attorney's conclusion that consumers would not be able to differentiate between a mark that ends with a Q and one that does not in this situation.

In addition to its lack of evidentiary support, the Examining Attorney's argument is also weak because it relies on an artificial separation of applicant's mark into two pieces. The Examining Attorney focuses only on the wording "IREZ" in applicant's mark, compares this to the registered mark, and claims that that the marks are confusingly similar on this basis. In taking this approach, the Examining Attorney dissects applicant's mark into two parts with no explanation as to why she does so or why the public would do so. There is only one word in applicant's mark, and it is IREZQ. There is no basis for assuming that consumers would, *sua sponte*, break down the mark into the word "IREZ" and the letter "Q." Assuming such behavior

with no rationale behind the assumption goes against the principle that marks must be considered in their entirety and not be parsed.

While consumers can distinguish the marks based on their appearances and pronunciation, consumers can further distinguish the marks based on their meanings. The registration record for the registered mark indicates that wording in the registered mark is a play on the word "iris." Specifically, the "Description of Mark" for the registered mark is "The mark consist[sic] of an abstract depiction of an eye over the word 'IREZ'." Given that the iris is a part of the eye (see Exhibit 1 to 3/12/15 Request for Reconsideration) and the mark is a design of an eye, consumers would assume that the wording "IREZ" in the registered mark is a play on the word "iris." This conclusion is especially logical because registrant's goods include cameras. Thus, the registered mark creates a unique commercial impression that allows consumers to distinguish the registered mark from applicant's mark.

The cited mark, as set forth above, consists of a design plus the word "IREZ." The Examining Attorney has simply cited the "standard doctrine" that the word portion of a composite mark is often considered the dominant feature in the mark. No actual analysis of the present mark was provided when making this statement. The Examining Attorney does concede that composite marks must be compared in their entirety when being compared with the putative conflicting marks.

In this case, the design element in Registrant's mark is significant, and should be considered with at least as much, if not more, weight as the word portion. "[W]ords or portions of words do not always dominate over design features. The issue turns on the facts of each

case.” *In re Elbaum*, 211 U.S.P.Q. 639, 641 (T.T.A.B. 1981). “The design, particularly if prominent . . . may dominate or at least be a significant factor in distinguishing the marks.” Richard L. Kirkpatrick, *Likelihood of Confusion In Trademark Law*, § 4:9.2 (2006). Indeed, “differences in designs may outweigh similarity of words.” *Id.* Professor McCarthy remarks that:

It has sometimes been stated that in a word-design composite mark, the words are always presumed to be the “dominant” portion. This might be labeled the “literacy” presumption, in that it assumes that words have more impact than designs, a dubious generalization. That this “rule” of word-dominance is merely a guideline is shown by cases finding that a design element is dominant if more conspicuous than accompanying words.

3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 23:47 (4th ed. 2006).

In this case, the design is more conspicuous and striking than the wording itself. The design portion of the mark is in the form of a unique abstract depiction of an eye. Such depiction is positioned above the word "IREZ," extends the full length of the combined mark, and is of a height over three times the height of the letters comprising the word portion of the mark. If there ever is a situation in which the design portion of a mark dominates, the cited mark is such a case. See *In re Computer Communications, Inc.*, 485 F.2d 1392 (CCPA 1973); and *Association of Co-Operative Members, Inc. v. Farmland Industries, Inc.*, 684 F.2d 1134 (5th Cir. 1982).

Moreover, the present situation is distinguishable from the cases cited by the Examining Attorney for the proposition that the word portion of a mark may likely be more impressed on a purchaser's memory than the design portion. In the case of *CBS, Inc. v. Morrow*, 708 F.2d 1579 (Fed. Cir. 1983), the design portion of the mark consists of a small stylistic light bulb forming the dot over the word "Thinker." The design portion of the mark in the *CBS, Inc.* case was much smaller in scale than the mark in question. Further, in the case of *In re Vittera Inc.*, 671 F.3d 1358 (Fed. Cir. 2012), the design portion of the mark is simply the letter "X". Moreover, in the case of *Giant Food, Inc. v. Nation's Foodservice, Inc.*, 710 F.2d 1565 (Fed. Cir. 1983), the design portion of the mark was simply the letter "Y".

In the present situation, on the other hand, the design portion of the registered mark is a striking abstract depiction of an eye that dominates above the letters "IREZ." Accordingly, the "literacy" presumption being espoused by the Examining Attorney does not apply in the present situation.

Overall, the differences in the appearances, pronunciations and meanings of the parties' marks result in the marks conveying two different commercial impressions. It is unlikely that a consumer would encounter applicant's mark, IREZQ, and assume that it designates the same source as the registered mark, IREZ and Design.

V. Goods Are Not Sufficiently Related to Support a Likelihood of Confusion

The Examining Attorney argues that the registrant's "computer peripherals" are commercially related to applicant's goods. However, in today's technology marketplace, the

term “computer peripherals” is so broad that it could encompass virtually any device that is plugged in to a computer. Further, these devices are computer hardware, so, if hardware and software are considered related, then “computer peripherals” are related to every type of hardware and software for purposes of a likelihood of confusion comparison.² Accordingly, making these assumptions renders a comparison of the goods virtually meaningless, as every product related to computers would be related to registrant’s products.

Looking at the identifications more realistically, the registered mark covers video cameras, webcams and computer programs relating to these items. It is a logical assumption that the registrant’s “computer peripherals” also relate to registrant’s video cameras and webcams. It is these goods that should be compared to applicant’s goods.

When this comparison is made, registrant’s webcam and associated software/accessories can be seen as unrelated to applicant’s goods. Applicant’s computer software and application software for controlling the operation of audio devices, mobile phones, and the transmission of data, computer software and application software to detect vehicle and personal locations and computer software and application software for provision of traffic information do not relate to webcams. Applicant’s various types of sensors are also not products that can be said to be related to registrant’s webcams, other than they all have something to do with computers, or all are operated by a computer device.

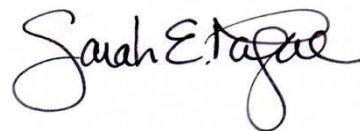
² The cases being relied upon by the Examining Attorney that computer hardware products are related to computer software products are all over 25 years old. Such decisions come from a bygone era and likely do not apply to the current computer age.

Regarding the evidence submitted by the Examining Attorney showing that some third parties sell goods contained in both the current application and the cited registration, it is to be expected that certain companies sell a variety of computer-related products. Indeed, many companies sell computer-related products and, as mentioned above, in today's marketplace, these products are ubiquitous. Consumers have grown savvy about what type of computer-related products they are looking for and, if shopping for applicant's software or sensors, will be specifically seeking these items and are not likely to also be considering other products, including registrant's products.

VI. CONCLUSION

For the foregoing reasons, applicant submits that there is no likelihood of confusion between applicant's mark and the registered mark and requests that the refusal to register be withdrawn.

Respectfully submitted,

A handwritten signature in black ink, reading "Sarah E. Nagae". The signature is fluid and cursive, with the first name "Sarah" being the most prominent part.

Sarah E. Nagae
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